No.

In The Supreme Court of the United States

PERCY STANLEY HARRIS,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

On Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Petitioner receive ineffective assistance of trial counsel under the Sixth Amendment where trial counsel failed to interpose an objection based upon the Fifth Amendment prohibition against double jeopardy where the jury returned a final verdict of guilty of second degree murder after being polled and was then permitted to continue to deliberate and returned a verdict of guilty as to first degree murder?

II. Did the Petitioner receive ineffective assistance of postconviction counsel under the Sixth Amendment where postconviction counsel failed to show: (1) special circumstances or lack of waiver with respect to the due process violations alleged in the original postconviction petition; and (2) prejudice to the Petitioner for any of the 16 allegations of ineffective assistance of counsel raised?

III. Did the Petitioner receive ineffective assistance of postconviction counsel under the Sixth Amendment based on the cumulative effect of postconviction counsel's errors?

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The opinion of the Court of Special Appeals of Maryland affirming the denial of the Petitioner's motion to reopen his postconviction petition is reported at 160 Md.App. 78, 862 A.2d 516 (2004) and is included in the Appendix at 1a-36a. The Memorandum, Opinion and Order of the Court of the Circuit Court for Prince George's County, Maryland denying the Petitioner's request for postconviction relief is included in the Appendix at 37a-46a. The Memorandum and Order of Court of the Circuit Court for Prince George's County, Maryland denying the Petitioner's motion to reopen his postconviction is included in the Appendix at 47a-48a. The Order of the Court of Appeals of Maryland denying the Petitioner's petition for a writ of certiorari is reported at 386 Md. 181, 872 A.2d 47 (2005) and is included in the Appendix at 49a. The Order of the Court of Appeals of Maryland denying the Petitioner's motion for reconsideration was filed June 17, 2005 and is included in the Appendix at 50a.

JURISDICTION

The judgment of the Court of Special Appeals of Maryland was entered on December 6, 2004. On April 8, 2005, the Court of Appeals of Maryland denied certiorari. On June 17, 2005, the Court of Appeals of Maryland denied the Petitioner's motion for reconsideration.

The jurisdiction of this court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime,

> unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Proceedings Below

On April 11, 1988, the body of Lyndetta Mickles of Baltimore was discovered in Watkins Park in Prince George's County, Maryland. An autopsy revealed that she had been shot in the head and shoulder with a .44 caliber pistol. On April 14, 1988, the Petitioner was charged, in the Circuit Court for Prince George's County,

with first-degree murder, second-degree murder, and the use of a handgun in the commission of a crime of violence in connection with Lyndetta's death. The Petitioner originally went to trial on May 7, 1990. The trial ended in a hung jury on May 16, 1990. App. 3a.

Petitioner's second trial began on November 1, 1990. The case was sent to the jury for deliberation on November 9, 1990. App. 3a, 7a. After many hours, the jurors sent a note saying that they had reached a verdict on two of the three charges. The court asked defense counsel if he had advised the Petitioner about the situation, to which defense counsel responded:

> I have advised my client the jury has reached a verdict on two of the three counts. I have advised him let's go ahead and bring it in so we'll know probably what the verdict is so bring it in. I know we have a right to insist on a verdict on all three counts but I think we'll just take it.

The jury was brought into the courtroom and returned guilty verdicts on the charges of second-degree murder and use of a handgun in the commission of a crime of violence. The judge asked defense counsel whether he wanted to have the jury polled on those counts, and defense counsel responded in the affirmative. The jurors were polled. The court then asked the jurors whether they thought a consensus as to the first-degree murder charge was reachable, to which the foreman responded, "the consensus was we cannot." The court explained that it could not accept that outcome and directed the jurors to deliberate further. App. 7a-8a.

Defense counsel objected to the court's instruction on the ground that it was an impermissible "*Allen* charge."[1] He did not object to the court's decision to have

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[1] *Allen v. United States*, 164 U.S. 492 (1896).

the jury continue deliberating on the first-degree murder charge, after having returned a guilty verdict for second-degree murder. App. 9a.

After many hours of further deliberations, the jury returned a verdict of guilty of first-degree murder. The jurors were polled, hearkened to their verdict, and discharged. App. 9a.

On January 8, 1991, the Petitioner was sentenced to life imprisonment for the first-degree murder conviction and a consecutive 20 years imprisonment for the handgun conviction. The second-degree murder conviction was merged. App. 9a.

On January 8, 1992, the Court of Special Appeals of Maryland affirmed in an unreported per curiam decision. *Harris v. State*, No. 362, September Term 1991. On April 24, 1992, the Court of Appeals of Maryland denied certiorari. *Harris v. State*, 326 Md. 365, 605 A.2d 101 (1992). App. 9a-10a.

On March 12, 1997, the Petitioner filed a petition for postconviction relief in the Circuit Court for Prince George's County in which he alleged, *inter alia*, ineffective assistance of trial counsel based on trial counsel's failure to object to the court's decision to allow the jury to deliberate on the first-degree murder charge after it had already been polled as to the guilty verdict on the second-degree murder charge, thereby violating his right not to be placed in double jeopardy. On September 5, 1997, the postconviction court issued a memorandum opinion and order denying postconviction relief. The court rejected the ineffective assistance argument as without merit. App. 10a-12a, 14a, 43a.

On September 20, 2002, the Petitioner filed a motion to reopen the postconviction proceeding and

requested a hearing. He again raised the claim of ineffectiveness of trial counsel based on trial counsel's failure to interpose a double jeopardy objection to the jury's continued deliberations after the jury rendered a final verdict as to second-degree murder. On April 30, 2003, the court issued a "Memorandum and Order" denying the Petitioner's motion to reopen, without a hearing, concluding that the motion to reopen was without merit. App. 15a-17a, 47a-48a.

On July 7, 2003, the Petitioner filed an application for leave to appeal with the Court of Special Appeals of Maryland, which was granted on October 24, 2003. App. 17a. On December 6, 2004, the Court of Special Appeals of Maryland, after addressing, among other issues, the double jeopardy/ineffective assistance of counsel issue on the merits, affirmed the decision of the circuit court. In denying relief on this issue, the court stated as follows:

> Harris first contends that the postconviction court abused its discretion in denying his motion to reopen based on ineffective assistance of trial counsel. He argues that his trial counsel performed deficiently, to his prejudice, by not objecting when the trial court directed the jury to continue deliberating on the first-degree murder charge after the court accepted verdicts of guilty of second-degree murder and handgun charges, and polled the jury on those verdicts.
>
> This contention only can have merit if Harris's double jeopardy argument has merit, which it does not.
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> ***
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> Harris's double jeopardy argument rests on the concept that he was impliedly acquitted of first-degree murder when the jury rendered its verdicts of guilt on the second-degree murder and handgun

charges and was polled; and therefore his conviction of first-degree murder was for a crime for which he had been acquitted. Harris bases his assertion that he was impliedly acquitted of first-degree murder on *Green v. United States*, 355 U.S. 184 (1957); on his reading of subsections (d) and (e) of Rule 4-327; and on *State v. Knight*, 143 Wis. 2d 408 (1988).

In *Green v. United States*, the defendant was indicted on two counts: 1) arson; and 2) causing the death of a woman by the alleged arson which, if true, amounted to first-degree murder. At the close of the evidence at trial, the court instructed the jury that it could find Green "guilty of arson under the first count ***and of either*** (1) first-degree murder ***or*** (2) second-degree murder under the second count," even though the prosecutor had not charged Green with second-degree murder under the second count. 355 U.S. at 185 (emphasis added). The jury returned a verdict of guilty of arson and second-degree murder; it was silent on the first-degree murder charge. The trial court accepted the verdict and dismissed the jury. After he was sentenced, Green appealed the second-degree murder conviction. The United States Court of Appeals for the District of Columbia reversed, on the ground that the trial court erred by instructing the jury on second-degree murder. On remand, Green was retried for first-degree murder, under the original indictment. He was found guilty of that crime and sentenced to death. On appeal, the judgment was affirmed.

The Supreme Court granted *certiorari* and reversed the conviction on double jeopardy grounds. Emphasizing that, at the first trial, the jury was instructed that it could find Green guilty of first-degree murder (felony murder theory) *or* second degree murder, the Court concluded that, in that circumstance, the guilty verdict for second-degree murder was an "implicit acquittal" on the first-degree murder charge. *Id.* at 190. The Court observed that, because "the jury was dismissed without returning any express verdict on [the first-degree murder] charge and without Green's consent . . . . [even though] it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so[,]" the circumstances were no different than if the jury had returned a verdict expressly stating: "We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree." *Id.* at 191. Accordingly, Green could not be retried for first-degree murder because his "jeopardy for first degree murder came to an end when the jury was discharged." *Id.*

There are crucial distinctions between this case and *Green*. In *Green*, the acquittal on the first-degree murder charge was implied from the jury's silence on that charge when they rendered guilty verdicts on the second-degree murder charge and then were discharged. In the case at bar, in contrast, the jury was not silent about the first-degree murder charge. Rather, when the jurors were convened to deliver their verdicts, the

> foreman said they had reached an agreement on the second-degree murder and handgun charges, but had not reached an agreement on the first-degree murder charge. From this statement, one cannot imply a unanimous verdict of acquittal, as Harris urges. Also, in *Green*, the jurors were told that they could convict Green of either second-degree murder or first-degree murder. Thus, silence on the first-degree murder charge in the face of a guilty verdict on the second-degree murder charge connoted a choice not to convict of first-degree murder. In Harris's trial, the jury was not so instructed and was free to return a verdict on the first-degree murder ***and*** second-degree murder charges.

App. 21a-25a. (Emphasis in original; footnotes omitted).

On April 8, 2005, the Court of Appeals of Maryland denied certiorari. App. 49a. On June 17, 2005, the Court of Appeals of Maryland denied the Petitioner's motion for reconsideration. App. 50a.

Statement of Facts

On November 9, 1990, the Petitioner's jury was sent out to deliberate. After the jury began its deliberations it sent a note to the trial judge. Thereafter, the following occurred in open court:

> **THE COURT**: All right. For the first time on this case today, Mr. Lamb [defense counsel], Mr. Manico [assistant State's Attorney], good afternoon to you.
>
> **MR. MANICO**: Good afternoon.

THE COURT: Mr. Lamb, you care to show this -- have you shared this information with your client, sir?

MR. LAMB: I have advised my client the jury has reached a verdict on two of the three counts. I have advised him lets go ahead and bring it in so we'll know probably what the verdict is so bring it in. I know we have a right to insist on a verdict on all three counts but I think we'll just take it.

THE COURT: Very well, sir. With that understanding on the record, let's bring them in.

(Whereupon, jury entering.)

THE COURT: Mr. Presley, the Court is in receipt of your note, sir. Just tell me which counts by number you have reached a verdict on.

THE FOREMAN: We have reached a verdict on Counts 2 and 3.

THE COURT: Okay. We'll take that verdict at this time.

THE DEPUTY CLERK: Ladies and gentlemen of the jury, have you agreed on your verdict.

THE JURY: Yes, sir.

THE DEPUTY CLERK: Who shall say for you?

THE JURY: Our foreman.

THE DEPUTY CLERK: Mr. Foreman, what say you in Criminal Trial 89 dash 917X, the State of Maryland versus Percy Stanley Harris, Count 1.

THE COURT: No.

THE DEPUTY CLERK: Is Percy Stanley Harris, Count 1 guilty or not guilty, second degree murder?

THE FOREMAN: We find the defendant guilty of second degree murder.

THE DEPUTY CLERK: Guilty or not guilty, Count 2, use of a handgun.

THE COURT: Which is actually Count 3.

THE DEPUTY CLERK: Use of handgun in the commission of a felony.

THE FOREMAN: We find the Defendant guilty of Count 3.

THE COURT: Just a minute, Mr. Lamb, do you wish the jury polled on those 2 counts, sir?

MR. LAMB: Yes.

THE COURT: Poll the jury as to those 2 Counts.

THE DEPUTY CLERK: Mr. Foreman, Denver Presley, you say you find the defendant Percy Stanley Harris guilty of Count one, second degree murder?

THE COURT: Madam Clerk, that's Count 2. That's Counts 2 and 3. No problem.

THE DEPUTY CLERK: Count 2 guilty, second degree murder; Count 3, guilty of use of a handgun in the commission of a felony? This your verdict?

THE FOREMAN: Yes.

(Whereupon, jury duly polled and each juror answered in the affirmative that the Foreman's verdict was his or her verdict.)

THE COURT: Okay. Mr. Foreman, ladies and gentlemen, please have a seat for a moment.

Okay. Mr. Presley, I know that you all have worked very hard in this case, sir, and I just want you to tell me -- I would like for this final count to be resolved. Sir, do you think it can be?

THE FOREMAN: Well, we have deliberated and we're at entrance (sic) here and the consensus was we cannot.

THE COURT: You cannot. Let me -- I am not willing to accept that at this point in time. That's not enough time. You have worked hard, but I am not willing to accept that because I think both sides deserve a resolution in this. If there is any way possible for you to do it, so what I'm going -- you can be seated. Thank you. Alright, further instruction.

Folks, the verdict, must be the considered judgment of each of you. In order to reach a verdict, all of you must agree. Your verdict must be unanimous. You must consult with one another and deliberate with the view to reaching an agreement if you can do so without violence to your individual judgment.

Each of you must decide the case for yourself but do so only after an impartial consideration of the evidence with your fellow jurors.

During deliberations, do not hesitate to re-examine your own views. You should change your opinion if convinced you are wrong, but do not surrender your honest belief as to the weight or effect of the evidence only because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict.

What I have said to you, folk is that take a look at the evidence. Don t be afraid to change your own view, but only if you feel your view is an erroneous one.

What I am telling you further is that both sides deserve a resolution of that particular count. Please go back and work hard like you have been working and try again and thank you for the job you have done so far.

You may now retire, folks.

(Jury retiring to deliberate further.)

THE COURT: Hand this first to Mr. Harris and his attorney and have the

State's Attorney all sign their name on it. It will go into the court file.

MR. LAMB: For the record, I would object to the Allen charge.

THE COURT: That Allen charge?

MR. LAMB: In light of what --

THE COURT: Hold it just a minute. Mr. Lamb, you and I have been around long enough to remember what Allen charges used to be like.

MR. LAMB: I understand, Your Honor.

THE COURT: That's so watered down that I do not expect it to change anybody's mind. I just want it resolved. If they are going to find the man not guilty, find him not guilty.

MR. LAMB: I think they reached a compromise verdict and didn't know how to tell you.

THE COURT: Well, if they come back and say we can't reach a verdict on it, then I will do what I have to do.

MR. LAMB: All right.

Thereafter, the court recessed. At 6:50 p.m. the jury reentered the courtroom. The court inquired whether the jury had reached a verdict as to Count 1. The jury responded that they "ha[d] not been able to resolve the verdict." The entire jury then indicated that further deliberations "would be fruitful." Deliberations then continued. At 8:10 p.m. the jury returned to the

courtroom and announced a verdict of guilty as to first degree murder. The jury was then polled and hearkened to their verdict.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF SPECIAL APPEALS OF MARYLAND THAT A FINAL VERDICT RENDERED AFTER THE JURY HAS BEEN POLLED AS TO SECOND DEGREE MURDER DOES NOT ACT AS AN IMPLIED ACQUITTAL AS TO FIRST DEGREE MURDER UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT IS IN CONFLICT WITH DECISIONS OF THE FIRST, FIFTH AND SEVENTH CIRCUITS AND PRESENTS AN OPPORTUNITY FOR THIS COURT TO CLARIFY THE APPLICATION OF *GREEN V. UNITED STATES*, 355 U.S. 184 (1957) AND *PRICE V. GEORGIA*, 398 U.S. 323 (1970) TO SIMILAR SITUATIONS.

The Fifth Amendment to the United States Constitution protects persons from being "subject for the same offence to be twice put in jeopardy of life or limb." The Fourteenth Amendment extends this protection to the States. *Benton v. Maryland*, 395 U.S. 784 (1984). A greater offense is by definition the same for purposes of double jeopardy as any lesser offense included in it. *Brown v. Ohio*, 432 U.S. 161, 168 (1977). Whatever the sequence may be, the Fifth Amendment forbids successive prosecutions for a greater and lesser offense. *Id. at 169.* The double jeopardy bar affords a criminal defendant three basic protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against prosecution for the same offense after conviction; and (3) it protects against multiple

punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The test for determining whether different common law offenses arising out of the same conduct are considered to be the same offense for double jeopardy purposes is the required evidence test. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). For double jeopardy purposes offenses are deemed to be the same where only one offense requires proof of an additional fact so that all elements of one offense are present in the other.

In Maryland, second degree murder is a lesser included offense of first degree murder. Murder is divided into first degree and second degree. Md. Ann. Code Article 27, § 407 established first degree murder as killing by poison, killing by lying in wait, and a willful, deliberate and premeditated killing. Section 411 provided that all other murders are murder in the second degree. These statutes did not create new statutory offenses but rather divided the common law crime of murder into degrees for sentencing purposes. *Bruce v. State*, 317 Md. 642, 644-45, 566 A.2d 103, 104 (1989).

In *Green v. United States*, 355 U.S. 184 (1957), the Court recognized that the Fifth Amendment "was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Id.* at 187. Accordingly, the Court ruled that where a defendant is charged with a greater included offense and a lesser included offense, and the jury returns a verdict of guilty as to the lesser included offense but remains silent as to the greater included offense, a retrial on the greater included offense is prohibited. *Id.* at 190-91.

In *Price v. Georgia*, 398 U.S. 323 (1970), the State attempted to retry the defendant for murder after a jury had returned a guilty verdict on the lesser included offense of voluntary manslaughter which was subsequently set aside because of a trial error. *Id.* at 324.

Applying the rationale of *Green*, the Court noted that a defendant's jeopardy on a greater charge ends when a jury is given a full opportunity to return a verdict on that charge and instead reaches a verdict on the lesser charge. *Id.* at 329. The Court further noted that "this Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, *whether that acquittal is express or implied by a conviction on a lesser included offense* when the jury was given a full opportunity to return a verdict on the greater charge." *Id.* (Emphasis added).

In Maryland, the polling of a jury and the acceptance of its verdict after the poll represents a final verdict. *Smith v. State*, 299 Md. 158, 168, 472 A.2d 988, 993 (1984). Thus, the Petitioner's partial verdict of second-degree murder was final after the jury was polled and the verdict was accepted by the trial court. At this point in time, trial counsel should have interposed an objection to any further deliberations as to first-degree murder on double jeopardy grounds. *See, e.g., United States v. White*, 972 F.2d 590, 595 (5th Cir. 1992)(a verdict is final if (1) the deliberations are over, (2) the result is announced in open court, and (3) the jury is polled and no dissent is registered); *see also United States v. Marinari*, 32 F.3d 1209, 1213 (7th Cir. 1994)(where a poll is taken, the verdict becomes final and "recorded," when the twelfth juror's assent to that verdict is made on the record).

In *Colin v. Lambert*, 233 F.Supp.2d 1293 (2002), the court was faced with a situation factually similar to the instant case. Colin was charged with a single count of kidnapping in the first degree in Oregon state court and tried before a jury. The jury was instructed that it could find the defendant guilty of either the greater charge of kidnapping in the first degree or of the lesser included offense of kidnapping in the second degree. *Id.* at 1294. After a period of deliberation the jury indicated that it had reached a verdict. A poll indicated that the jury had

unanimously convicted the defendant of the lesser included charge but could not agree on the greater charge. *Id.* at 1294-95. The court directed the jury to continue its deliberation after which it returned a verdict of guilty to kidnapping in the first degree. *Id.* at 1295-96. After exhausting his state court remedies of direct and collateral review, Colin filed a federal habeas alleging ineffective assistance of trial counsel based on trial counsel's failure to interpose a double jeopardy objection when the trial court received a guilty verdict on the lesser included offense and thereafter ordered the jury to continue its deliberation on the charged offense. Relying on *Green v. United States*, *supra*, and *Price v. Georgia*, *supra*, the court analyzed the situation as follows:

> [T]he jury foreman made clear to the court that the jury unanimously concluded Petitioner was guilty of the lesser-included offense only after they were unable to reach agreement on the charged offense. Although the trial judge may have been dissatisfied with the length and outcome of the initial deliberations, he explicitly "accepted" and "received" the verdict of guilty on the lesser included offense of Kidnapping in the Second Degree *before* he directed the jury to resume deliberations on the charged offense. After the court received the verdict on the lesser-included offense, however, further deliberation on the charged offense was prohibited by the Supreme Court's decisions in *Green* and *Price* even though the court had not yet entered a formal judgment of conviction on the lesser-included offense. As the Fifth and Seventh Circuits have held, a verdict is final and a jury may not be allowed or instructed to deliberate further after their "deliberations are over," the

> results of their deliberations have been "announced in open court, and . . . the jury is polled and no dissent is registered." *United States v. White*, 972 F.2d 590, 595 (5th Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 1007, 113 S.Ct. 1651, 123 L.Ed.2d 272 (1993). *See also United States v. Marinari*, 32 F.3d 1209, 1213 (7th Cir. 1994) ("Where a poll is taken, the verdict becomes final and "recorded," when the twelfth juror's assent to that verdict is made on the record."). Here the jury finished deliberating and announced its verdict of guilty on the lesser-included offense, the court accepted and received that verdict, the court polled the jury regarding that verdict, and no juror registered a dissent. Consistent with the analysis of the Fifth and Seventh Circuits, this Court concludes the jury's verdict of guilty on the lesser-included offense was final when the trial court received it.

233 F.Supp.2d at 1301-02. (Emphasis in original).

Thus, the court held that:

> trial counsel provided constitutionally ineffective assistance. . . when he (1) failed to object to the court's directions to the jury to continue deliberations on the charged offense after the jury had rendered and the court had accepted and received their guilty verdict on the lesser-included offense and (2) failed to object to the court's receipt of the subsequent guilty verdict on the charged offense.

Id. at 1302.

Applying the case law to the case *sub judice*, it is patent that second-degree murder is a lesser included offense of first-degree murder and that the Petitioner was twice placed in jeopardy after the jury returned a final verdict of guilty as to second-degree murder and was then permitted to continue to deliberate, and ultimately return a verdict, as to first-degree murder. Under the circumstances of this case, the Petitioner was twice put in jeopardy for the same offense.

The Sixth Amendment to the Constitution of the United States, applicable to the States through the Due Process Clause of the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." *Argersinger v. Hamlin*, 407 U.S. 25, 27 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963). "[T]he right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). Counsel can deprive a defendant of the right to effective assistance by simply failing to render adequate legal assistance. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A petitioner alleging actual ineffectiveness must show: (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland*, at 686. The performance component is satisfied if counsel's representation fell below an objective standard of reasonableness. *Id.* at 688. The measure of attorney performance is reasonableness under prevailing professional norms. *Id.* "In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in a particular case." *Id.* at 690. The Sixth Amendment does not specify the

particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. *See Michel v. Louisiana*, 350 U. S. 91, 100-101 (1955).

A petitioner must also show prejudice. This test is met when it is shown that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, at 694.

It is respectfully argued that Petitioner's trial counsel provided ineffective assistance based upon his failure to object to the further jury deliberations after a final verdict was rendered as to second-degree murder once the jury had been polled and its verdict accepted. Accordingly, the Petitioner is entitled to have his first-degree murder conviction reversed.

II. THE COURT OF SPECIAL APPEALS OF MARYLAND MISAPPLIED THE DECISION IN *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984), WHERE IT HELD THAT THE PETITIONER WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL BASED ON POSTCONVICTION COUNSEL'S FAILURE TO SHOW: (1) SPECIAL CIRCUMSTANCES OR LACK OF WAIVER WITH RESPECT TO THE DUE PROCESS VIOLATIONS ALLEGED IN THE ORIGINAL PETITION; AND (2) PREJUDICE TO THE PETITIONER FOR ANY OF THE 16 ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF

COUNSEL RAISED. IN BOTH CIRCUMSTANCES, THE PETITIONER'S POSTCONVICTION COUNSEL'S UTTER FAILURE TO PROPERLY PLEAD THE ERRORS CONSTITUTED SERIOUS ERROR THAT PREJUDICED THE PETITIONER BY PROHIBITING THE POSTCONVICTION COURT FROM REACHING THE MERITS OF EACH COMPLAINT OF ERROR.

In denying the Petitioner's petition for postconviction relief, the Circuit Court for Prince George's County provided the following analysis of waiver caselaw:

> Petitioner is required by the Maryland Code Annotated, Article 27, section 645(A) and the Maryland Rule 4-402(a)(4), (6) and (7) to properly address the matter of waiver in his petition or in any memorandum.
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> ***
>
> Interpreting Section 645(A), The Court of Appeals has held that the knowing and intelligent waiver is only required where "fundamental" rights are at stake. Non-"fundamental" rights are waived where the possibility to exercise those rights existed, but petitioner or his counsel did not do so. *See McElroy v. State*, 329 Md. 136 (1993), *Walker v. State*, 343 Md. 629 (1996), *Wyche v. State*, 53 Md.App. 403 (1983). In *McElroy v. State*, the Court of Appeals held that the petitioner therein had waived his right to raise the trial judge's failure to instruct him that he did not have to abide by the plea agreement. The Court of Appeals

> found that this required instruction is a "fundamental" right. The Court also found that the petitioner was advised of his right to appeal and clearly acknowledged that advice on the record, but that he did not offer any evidence to rebut the presumption that he could have alleged this error on appeal. *Id.* at 146, 147. Petitioner did appeal his case, so he was certainly aware of his rights. Nonetheless, Petitioner did not raise most of his due process violations below in his appeal.

App. 37a-38a.

Next, in addressing each of Petitioner's three due process allegations of error, the postconviction court made the following observation:

> Considering the foregoing examination of due process, the Court is not persuaded that this ground has not been waived. Petitioner has said little or nothing to rebut the presumption of waiver, and has not demonstrated any "special circumstances," even if the ground mentioned constitutes a fundamental right.

App. 39a.

The above explanatory paragraph describing why the court was refusing to reach the merits of each issue was repeated verbatim three times, once for each allegation of a due process violation.[2] Postconviction

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[2] The three due process violations complained of in Petitioner's Petition for Post Conviction Relief are: (1) improper procedure used in obtaining verdict; (2) faulty reasonable doubt instruction; and (3) improper closing argument by the State.

counsel's failure to plead lack of a waiver – a waiver that is presumed in a postconviction proceeding – is fatal and fundamental attorney error in a postconviction proceeding. The prejudice to the Petitioner is plain. Although the due process violations all involved fundamental rights, they were never reached on the merits solely because of the faulty pleading. Because the postconviction court was precluded from reaching the merits, the Petitioner has never had an opportunity to litigate these non-waived issues dealing with fundamental rights.

Similarly, Petitioner's postconviction counsel failed its burden of pleading by not showing prejudice for any of the 16 ineffective assistance of trial and appellate counsel claims raised in Petitioner's petition for postconviction relief. The postconviction court pointed out that in 14 of the 16 ineffective assistance of counsel claims raised by Petitioner, that Petitioner had not demonstrated how reasonable doubt would have been found in light of the error. App. 41a-45a. Petitioner's postconviction counsel was ineffective in this regard.

Strickland v. Washington, 466 U.S. 668 (1984), requires a two-prong test for determining whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The two-prong test for effective assistance of counsel includes both the "performance component" and the "prejudice component."

The Supreme Court, in *Strickland*, made the following observation regarding the prejudice component:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, *there is no reason for a court deciding an ineffective assistance claim to approach the inquiry*

> *in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.* In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. *If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.*

Id. at 697. (Emphasis added). Similarly, Maryland's appellate courts have offered guidance to judges on this point. The Court of Appeals has noted that "...we need not approach the inquiry in any particular order, nor are we required in every instance to address both components of the *Strickland* test." *Oken v. State*, 343 Md. 256, 284-85, 681 A.2d 30, 44 (1994). The Court of Special Appeals has noted that "*Strickland* elements of ineffective assistance need not be taken up in any particular order. In other words, we need not find deficiency of counsel in order to dispose of a claim on the grounds of a lack of prejudice." *Cirincione v. State*, 119 Md.App. 471, 486, 705 A.2d 96, 102 (1998).

Here, the postconviction court was not presented a postconviction petition upon which relief could be granted because one of the two requirements under *Strickland* was simply not plead. This was a serious and inexplicable attorney error that resulted in Petitioner's postconviction petition being denied without reaching its merits, and therefore prejudiced Petitioner. Petitioner's postconviction proceeding should have been reopened for this reason alone.

III. THE COURT OF SPECIAL APPEALS OF MARYLAND MISAPPLIED THE DECISION IN *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984), WHERE IT HELD THAT THE PETITIONER WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL EVEN IF NONE OF THE OTHER MULTIPLE SERIOUS ATTORNEY ERRORS COMMITTED BY POSTCONVICTION COUNSEL WERE SUFFICIENT, INDIVIDUALLY, TO PROVIDE POSTCONVICTION RELIEF, WHERE THE CUMULATIVE EFFECT OF THE SERIOUS ATTORNEY ERRORS OF POSTCONVICTION COUNSEL, IN FAILING TO POSTCONVICT TRIAL COUNSEL AND/OR APPELLATE COUNSEL FOR THE CUMULATIVE EFFECT OF HIS SERIOUS ATTORNEY ERRORS, ENTITLED THE PETITIONER TO RELIEF.

The cumulative effect of postconviction counsel's serious attorney errors prejudiced the Petitioner. Although each of postconviction counsel's errors, in failing to postconvict trial counsel, constituted prejudicial serious attorney error, together they had a cumulative effect that was much greater than their individual sums. This is particularly so in the Petitioner's case.

Postconviction counsel (1) failed to postconvict trial counsel based on trial counsel's failure to properly object to a flight instruction given to the jury when evidence indicated flight from another crime; (2) failed to postconvict appellate counsel based on appellate counsel's failure to raise on appeal the issue surrounding a prejudicial and suggestive identification; (3) failed to

properly plead the postconviction petition; and (4) failed to postconvict trial counsel for serious cumulative attorney errors, each of which individually – and all of which cumulatively – caused the Petitioner prejudice.

The errors committed by trial counsel went directly to key evidence that was used against the Petitioner by the jury to convict him. This, combined with the fact that the jury should have been precluded from deliberating any further on the first-degree murder charge all lend themselves to the proposition that the cumulative effect of these errors on the Petitioner's conviction cumulatively rise to the level enunciated in *Strickland* and its progeny for demonstrating ineffective assistance of counsel.

The cumulative effect of these serious attorney errors caused the jury's verdict to be unreliable. "Even when no single aspect of the representation falls below the minimum standards required under the Sixth Amendment, the cumulative effect of counsel's entire performance may still result in a denial of effective assistance." *Cirincione v. State*, 119 Md.App. 471, 506, 705 A.2d 96, 112-13 (1998). "[T]his cumulative effect may be applied to either prong of the *Strickland* test." *Id.* at 506, 705 A.2d at 113. *Cirincione* further held that "numerous non-deficient errors may cumulatively amount to a deficiency, or numerous non-prejudicial deficiencies may cumulatively cause prejudice." The court required that all errors – even those that are non-deficient – to be factored in when considering the cumulative effect of the errors. *Id.* If the multiple serious attorney errors of postconviction counsel, vis-à-vis the multiple serious attorney errors of trial counsel are considered as a whole, with the cumulative prejudice flowing therefrom, it is clear that the Petitioner was entitled to postconviction relief for ineffective assistance of postconviction counsel in permitting ineffective assistance of trial counsel. "[T]he touchstone is whether, in view of all the circumstances, our confidence in the

our confidence in the result has been undermined by counsel's failings." *Id.* at 506, 705 A.2d at 113.

CONCLUSION

For the foregoing reasons, the Petitioner, Percy Stanley Harris, requests this Court grant his Petition for a Writ of Certiorari for the purposes of clarifying the application of the double jeopardy clause to cases where a final verdict is rendered as to a lesser included charge and the jury is then returned to continue its deliberations as to the greater charge, the application of the Sixth Amendment right to the effective assistance of counsel to postconviction proceedings, and the application of the cumulative effect of postconviction counsel's errors.

Respectfully submitted,

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APPENDIX A

REPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1268

September Term, 2003

PERCY STANLEY HARRIS

v.

STATE OF MARYLAND

Kenney,

Eyler, Deborah S.,

Eldridge, John C. (Ret'd,
Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: December 6, 2004

The Circuit Court for Prince George's County denied a motion by Percy Stanley Harris to reopen a closed postconviction proceeding, under Maryland Code (2001), section 7-104 of the Criminal Procedure Article ("CP").[1] The issues on appeal are:

I. Did the circuit court abuse its discretion in denying Harris's

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[1] CP section 7-104 is part of the Uniform Postconviction Procedure Act ("UPPA"), which is codified at CP sections 7-101 *et seq.* and Maryland Rules 4-401 *et seq.*

motion to reopen his closed postconviction proceeding based on an allegation of ineffective assistance of trial counsel?

II. Did the circuit court abuse its discretion in denying Harris's motion to reopen his closed postconviction proceeding based on allegations of ineffective assistance of postconviction counsel?

For the following reasons, we shall affirm the order of the circuit court.

FACTS AND PROCEEDINGS

Background

On January 22, 1988, in Sussex County, Virginia, Harris, then 43 years old, was charged with the abduction and attempted murder of Lyndetta Mickles, his 17-year-old girlfriend.[2] Three days later, Federal Bureau of Investigation ("FBI") agents arrested Harris in Baltimore for unlawful flight to avoid prosecution of the Sussex County charges. Upon his arrest, Harris was advised of the charges against him as well as the factual allegations relating to the charges. He then was released on bail.

On February 13, 1988, Harris abducted Lyndetta from a bus stop in Baltimore, took her to a house in the

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[2] Lyndetta had appeared at Christine and Webster Massenburg's residence in Sussex, Virginia, during the early morning hours of January 22, 1988, badly scratched and bruised and wearing only panties. Police responded to the Massenburg home and took Lyndetta to a hospital for treatment. At the hospital, Lyndetta alleged that earlier that evening Harris had beaten her in his home in Baltimore, Maryland; driven her to a rural road in Sussex County; beaten her until she lost consciousness because she would not perform sexual acts on him; dragged her to a wooded area on the side of the road; and left her there.

District of Columbia, and beat her to try to force her to write a recantation letter. The police rescued Lyndetta on February 29, 1988. The next day, a Washington, D.C., court issued a warrant for Harris's arrest on kidnapping charges.

Sometime on the night of Sunday, April 10, or in the early morning hours of Monday, April 11, 1988, Lyndetta was murdered. She was last seen leaving her grandmother's home in Baltimore around 6:00 p.m., on April 10. A passerby discovered her body around 1:00 a.m. on April 11, in a secluded area near Watkins Park, in Prince George's County, Maryland. Her wounds were fresh and she was still bleeding. An autopsy revealed that she had been shot in the head and the left shoulder with a .44 caliber pistol. Additionally, a DNA test on semen found inside Lyndetta's body and in her panties revealed the presence of Harris's sperm.

On April 14, 1988, Harris was charged, in the Circuit Court for Prince George's County, with first-degree murder, second-degree murder, and the use of a handgun in the commission of a crime of violence in connection with Lyndetta's killing. A warrant was issued for his arrest.

On May 30, 1988, Harris was apprehended in Uncasville, Connecticut.

The charges against Harris went to trial on May 7, 1990. The trial ended in a hung jury on May 16, 1990. Harris's second trial began on November 1, 1990.

November 1990 Trial

One of the State's witnesses was Viola Mickles, Lyndetta's grandmother. Mickles had testified as a rebuttal witness for the State at Harris's first trial. Her testimony then consisted of explaining that she had received several telephone calls from an unidentified

person between February 13 and 29, 1988 — the dates during which Harris held Lyndetta in Washington, D.C. At the retrial, however, Mickles was called in the State's case-in-chief and testified that Lyndetta had come to her house for a visit on April 10, the day before her body was found. When the prosecutor asked Mickles what Lyndetta had said during her visit, defense counsel objected because the testimony had not been introduced at the previous trial. A bench conference ensued. The trial court decided to hear Mickles's testimony out of the presence of the jury and then rule on its admissibility.

Mickles testified that she had seen Lyndetta late in the afternoon on April 10, and that Lyndetta had said she was going to a movie with "Percy"; Harris then picked Lyndetta up in an automobile to go to the movies. Defense counsel objected to all of this testimony, and the trial judge ultimately ruled that Mickles would not be permitted to identify Harris before the jury by pointing to him or using the name "Percy." Mickles would be permitted to give a physical description of the person she had seen in the car, however, and to relate what Lyndetta had said her intentions were that night — to go to the movies with Percy.

The next day, Mickles testified before the jury that Lyndetta had said, on April 10, that "her and Percy was going to the movie." Mickles further testified that, from her bedroom window, she saw Lyndetta get into a "middle-sized car . . . dark [in] color" with a "[m]iddle-aged black" man driving.

On cross-examination, defense counsel established that the first time Mickles had seen Harris was when he picked up Lyndetta to take her to the movies that night, and that she had seen Harris since then during the ensuing court proceedings.

FBI Agent Thomas Montgomery testified for the State. He recounted that, on April 13, 1988, acting as

part of a fugitive investigation, he went to the home of Flora Holt, Harris's aunt, in Washington, D.C. He told Holt he had a warrant for Harris's arrest for the kidnapping of Lyndetta, and that Prince George's County "police officers [ ] were interested in talking to him about homicide." Agent Montgomery explained that he disclosed Lyndetta's name to Holt as the victim of the kidnapping because the name was written on the arrest warrant. He did not disclose Lyndetta's name as the homicide victim, however, because the murder had occurred in Prince George's County and was being handled by authorities there.

Agent Montgomery further testified that, upon determining that Harris was not at Holt's house, he started to leave. Holt summoned him back inside, saying that Harris was on the telephone and wanted to speak to him. Agent Montgomery spoke to Harris on the telephone, saying: "Mr. Harris, we have an arrest warrant for you, we'd like to work out some arrangements to take care of this warrant." Harris responded, "What was this about, some homicide," to which Agent Montgomery said, "Well, that's not what I have a warrant for. I have a warrant charging you with kidnapping." To this, Harris replied: "I didn't kill that girl. She was my baby. I wouldn't have hurt her." Harris then agreed to turn himself in to Metropolitan Police Department headquarters in Washington, D.C. the next day. He did not do so, however.

Witnesses for the defense testified that Agent Montgomery indeed had related Lyndetta's name to the homicide. According to one such witness, Agent Montgomery pulled out a picture of Lyndetta and showed it to Holt, identifying the person in it as being the victim of the homicide. Another witness testified that, during Agent Montgomery's telephone conversation with Harris, the agent told Harris he was wanted "because of Lyndetta . . . ."

The trial court gave the jury a flight instruction. Defense counsel objected, arguing:

> [I]t's my understanding [that a flight instruction] is normally given if there's some evidence of fugitive flight.
>
> In this case we're dealing with the warrant for murder that was issued by Prince George's County. We're not talking about evidence of flight from any other warrants. The Court will recall the record indicates there was a kidnapping warrant issued out of the District of Columbia on or about March 1st . . . at the time FBI Agent Montgomery went to [Holt's house]. While he was at [Holt's house] he received a telephone call from . . . Harris.
>
> There's no evidence whatsoever where . . . Harris was at the time that telephone call originated. All we have, at the time he was arrested, he was with his brother in Connecticut. There's no indication that he went from a place to a place as the result of anybody being advised, anything being told to him, concerning possible charges. As a fact, I believe at the time they went to [Holt's house] there wasn't even a warrant for murder issued yet. Prince George's County Police had not issued it yet. They were there to execute a kidnapping warrant and to quote investigate an alleged kidnapping and that was the testimony in the record and I don't think that [a] flight instruction would be appropriate unless the defendant is aware of the fact that there is a warrant for his arrest for a charge and that fact was never communicated to him.

The court explained its reason for giving the flight instruction, stating:

> [T]he State adduced evidence that [Agent Montgomery did not] mention [ ] who it was that was deceased [when he went to Holt's house]. If it had laid there, then I would not give an instruction but there were witnesses who took the stand for the defense and put before this jury that indeed [Agent Montgomery] did say it was for Lyndetta and that's why they were looking for him and based upon that I'm going to give the instruction.

The case was sent to the jury for deliberation on November 9, 1990. After a few hours, the jurors sent a note saying that they had reached a verdict on the second-degree murder and handgun charges but were deadlocked on the first-degree murder charge. The court asked defense counsel if he had advised Harris about the situation, to which defense counsel responded:

> I have advised my client the jury has reached a verdict on two of the three counts. I have advised him let's go ahead and bring it in so we'll know probably what the verdict is so bring it in. I know we have a right to insist on a verdict on all three counts but I think we'll just take it.

The jury was brought into the courtroom and returned guilty verdicts on the charges of second-degree murder and use of a handgun in the commission of a crime of violence. The judge asked defense counsel whether he wanted to have the jury polled on those counts, and defense counsel responded in the affirmative. The jurors were polled. The court then asked the jurors whether they thought a consensus as to the first-degree murder charge was reachable, to which the foreman

responded, "the consensus was we cannot." The court explained that it could not accept that outcome and directed the jurors to deliberate further, instructing:

> Folks, the verdict must be the considered judgment of each of you. In order to reach a verdict, all of you must agree. Your verdict must be unanimous. You must consult with one another and deliberate with the view to reaching an agreement if you can do so without violence to your individual judgment.
>
> Each of you must decide the case for yourself but do so only after an impartial consideration of the evidence with your fellow jurors.
>
> During deliberations, do not hesitate to re-examine your own views. You should change your opinion if convinced you are wrong, but do not surrender your honest belief as to the weight or effect of the evidence only because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict.
>
> What I have said to you, folks, is that take a look at the evidence. Don't be afraid to change your own view, but only if you feel that your view is an erroneous one. What I'm telling you further is that both sides deserve a resolution of that particular count. Please go back and work hard like you have been working and try again and thank you for the job you have done so far.
>
> You may now retire, folks.

Defense counsel objected to the court's instruction on the ground that it was an impermissible "*Allen* charge."[3] He did not object to the court's decision to have the jury continue deliberating on the first-degree murder charge, after having returned a guilty verdict for second-degree murder.

After further deliberations, the jury returned a verdict of guilty of first-degree murder. The jurors were polled, hearkened to their verdict, and discharged.

On January 8, 1991, Harris was sentenced to life imprisonment for the first-degree murder conviction and a consecutive 20 years imprisonment for the handgun conviction. The second-degree murder conviction was merged.

Direct Appeal

Harris pursued an appeal in this Court. He raised three issues:

> [w]hether the trial court propounded an incorrect and coercive *Allen* charge . . .; [w]hether the trial court erred in propounding a flight instruction; [and] [w]hether the trial court erred in its instructions . . . [about the] use of a handgun in the commission of a crime of violence.

On January 8, 1992, this Court filed an unreported *per curiam* opinion affirming the judgments. *Harris v. State*, No. 362, September Term 1991 (filed January 8, 1992). We held that the *Allen*-type charge given by the trial court was "perfectly acceptable" and "closely adhered to ABA-recommended language"

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[3] *Allen v. United States*, 164 U.S. 492 (1896).

approved by the Court of Appeals in *Kelly v. State*, 270 Md. 139 (1973). Slip op. at 11. Noting that it was "entirely reasonable that a jury, by relying solely on the circumstantial evidence presented, could doubt the coincidence of the fact that Harris suddenly should seek shelter in another state several hundred miles away from his usual area of abode[,]" we concluded that there was sufficient circumstantial evidence in the record to generate an instruction on flight.[4] Slip op. at 16.

On February 17, 1992, our mandate issued. Thereafter, Harris filed a petition for writ of *certiorari*, which the Court of Appeals denied on April 24, 1992. *Harris v. State*, 326 Md. 365 (1992).

Post Conviction Proceeding

On March 12, 1997, Harris filed a petition for postconviction relief under the UPPA, which, at the time, was codified at Maryland Code (1957, 1992 Repl. Vol., with amendments effective November 1, 1995), Article 27, sections 645A through 645J.[5] He requested a hearing, a new trial, and costs of the proceeding. He set forth three "claims": due process errors by the trial court affecting "fundamental rights" that he did not "intelligently and knowingly" waive; ineffective assistance of trial counsel; and ineffective assistance of appellate counsel.

Harris's due process claim was three-fold. First, he alleged that the trial court used "Improper Procedure[ ]" to obtain the guilty verdict for first-degree murder

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[4] We further noted that "[t]here was evidence that Harris drove a car with Maryland plates; that, in the months immediately preceding the murder, he had lived either with his brother in Baltimore or his aunt in Washington; that Harris knew police wanted to question him about the Mickles murder; and that, at the time of his arrest, he had moved to Connecticut." Slip op. at 15.

[5] Article 27, sections 645A through 645J were recodified at CP sections 7-101 *et seq.*, effective October 1, 2002.

because, when the jury returned a guilty verdict for second-degree murder, that verdict was final, accepted by all parties, and obtained in accordance with Maryland Rule 4-327(a) and (e), and, as such, amounted to an "implied acquittal" on the first-degree murder charge. The subsequent guilty verdict on the first-degree murder charge therefore violated his constitutional right not to be placed in double jeopardy, which he had not "intelligently and knowingly waived" in a prior proceeding. Relatedly, Harris alleged that the trial court had erred by allowing the jury to deliberate on the first-degree murder charge after being polled on its verdict of guilty of second-degree murder, noting that "[a] verdict is final when a jury is polled." This involved a fundamental right that he had not "intelligently and knowingly waived."

Second, Harris alleged that the trial court's instruction on "reasonable doubt" had reduced the State's burden of proof below the "beyond a reasonable doubt" standard, violating his fundamental right to the presumption of innocence, which he also had not knowingly and intelligently waived. Finally, Harris alleged that the trial court had committed plain error by not striking statements by the prosecutor in closing argument expressing a belief that the State's witnesses were credible and suggesting defense counsel had purposely misled the jury during trial.

Harris's ineffective assistance of trial counsel claim rested on seven grounds. Most significantly, he alleged that trial counsel had performed deficiently by "open[ing] the door," on cross-examination of Mickles, so as to have her identify him as the man who came to pick up Lyndetta in a dark car on Sunday, April 10, 1988. Trial counsel's questions elicited damaging evidence that Harris was the last person seen with Lyndetta before her murder – after trial counsel had successfully convinced the court to preclude Mickles from identifying Harris as

the man Lyndetta got into the car with and from referring to him as "Percy."[6]

Finally, Harris's claim of ineffective assistance of appellate counsel rested on nine grounds. Most significantly, he alleged that appellate counsel had performed deficiently by not raising the double jeopardy issue on direct appeal.[7]

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[6] Harris's six other ineffectiveness claims included: failing to object when the Deputy Sheriff of Sussex County, Virginia testified that Harris was in jail in February of 1988, thereby allowing improper negative character evidence to go to the jury; failing to object when Agent Montgomery testified that Harris had agreed to turn himself in, which constituted an "indirect comment on [Harris's] right to remain silent in the face of accusations;" failing to object to the admissibility of the arrest warrant for kidnapping, thereby allowing the jury to consider inadmissible "other crimes" evidence; failing to object to the State's comments in opening and closing remarks regarding Harris's other crimes, thereby allowing the jury to consider inadmissible "other crimes" evidence; failing to object to the court's faulty reasonable doubt instruction, thereby depriving Harris of the right of presumed innocence; failing to object to the court's decision to allow the jury to deliberate on the first-degree murder charge after it had already been polled as to the guilty verdict on the second-degree murder charge, thereby violating Harris's right not to be placed in double jeopardy.

[7] Harris also alleged, with minimal elaboration, that his appellate counsel was ineffective because he failed to raise, as plain error, the trial court's improper reasonable doubt instruction; failed to raise, as plain error, the trial court's ruling at trial, over defense objection, excluding Lyndetta's school records, which were admissible for impeachment purposes; failed to raise, as plain error, the trial court's decision to allow the State to introduce rebuttal evidence at trial of a postcard allegedly mailed to Harris by Lyndetta; failed to raise, as plain error, improper and prejudicial statements the prosecutor made in opening and closing arguments; failed to raise, as plain error, admission into evidence testimony that Harris was in jail in February of 1988 for another unadjudicated crime; failed to raise, as plain error, that testimony that Harris had said he would surrender was an "indirect comment" on Harris's right to remain silent; failed to raise, as plain error, the trial court's decision to allow the State, over defense objection, to reopen its case and allow Lyndetta's mother to testify that Lyndetta was present at a Virginia court for her kidnapping proceedings; failed to raise, as plain error, the trial court's decision to allow into evidence the arrest warrant for kidnapping in Washington, D.C.

On April 2, 1997, the State filed an opposition to Harris's petition for postconviction relief, a memorandum of law in support, and attached portions of the trial transcript.

The postconviction court held an evidentiary hearing on June 20, 1997.

On June 26, 1997, Harris filed a supplemental memorandum to his petition for postconviction relief. In it, he emphasized that the trial court's "agreement" with trial counsel and Harris to accept a partial verdict barred further deliberation on the first-degree murder charge; and that, by allowing the jury to further deliberate on that charge, the trial court "breached its agreement" with trial counsel. On this logic, the jury's guilty verdict on the second-degree murder charge was an "implied acquittal" and therefore allowing it to consider the first-degree murder charge was improper. Additionally, Harris reasserted that the trial court's reasonable doubt instruction was defective under federal constitutional law.

On July 10, 1997, Harris filed a second supplemental memorandum, addressing the State's opposition to his petition. Harris attacked the State's argument that *State v. Griffiths*, 338 Md. 485 (1995), supported the proposition that "a retrial for a greater offense after a hung jury is not prohibited under Maryland law when the jury convicts on a lesser included offense and is hung on the greater offense." He argued that his case was different than *Griffiths* because the parties had agreed not to wait for a verdict on the first-degree murder charge when they decided to accept the jury's decision on the other charges. He cited his trial counsel's statement, "I know we have a right to insist on

a verdict on all three counts but I think we'll just take it," and the trial court's response, "Very well sir. With that understanding on the record, let's bring them in," as evidence that there was an agreement not to allow the jury to deliberate on the remaining count.

On September 5, 1997, the postconviction court issued a memorandum opinion and order denying Harris's petition for postconviction relief. The court noted that, under the UPPA, Harris was required to prove that he had not waived "any alleged grounds for [ ] relief" and to allege errors that had not been "previously and finally litigated." The postconviction court explained that, with respect to fundamental rights, "waiver" in the postconviction context means "intelligently and knowingly failing to make such allegations before trial, at trial or on direct appeal, unless the failure is excused because of 'special circumstances.'" After characterizing Harris's claims of trial court error as alleged due process violations, the court found that Harris had "done little or nothing" to rebut the presumption that he had waived those grounds for relief and had not demonstrated any "special circumstances" for why he had failed to pursue the alleged instances of trial court error on direct appeal.

With regard to the ineffective assistance of trial and appellate counsel claims, the postconviction court explained that, under *Strickland v. Washington*, 466 U.S. 668 (1984), Harris had the burden of showing that counsel performed deficiently and that the deficient performance prejudiced him. The court then rejected Harris's ineffective assistance arguments as without merit. Most significantly, it found that trial counsel had not performed deficiently by asking Micklos to identify Harris in court, after successfully obtaining a ruling precluding the State from doing the same, saying that "no persuasive evidence, reasons or authority demonstrating error" were shown. The court also found that the record did not show any agreement between the parties and the trial court that, upon taking the verdict on second-degree

murder and the handgun charge, the jury deliberations would end.[8]

On September 26, 1997, Harris filed in this Court an application for leave to appeal the postconviction order. This Court denied the application on January 14, 1998.

Motion to Reopen Post Conviction Proceeding

On September 20, 2002, Harris filed a motion to reopen the postconviction proceeding under CP section 7-102 and requested a hearing under CP section 7-108(b)(1). In his supporting memorandum of law, he argued that it was "in the interests of justice" to reopen the proceeding because he had been denied effective assistance of counsel at the trial, appellate, and postconviction proceedings; and that, upon reopening the proceeding, "in the interests of justice," the postconviction court should vacate his conviction and remand the case for a new trial.

In addition to making the same ineffectiveness arguments raised against trial and appellate counsel in his 1997 petition for postconviction relief, Harris argued that his postconviction counsel was ineffective for failing to criticize trial counsel for not objecting to the flight instruction, when there was evidence that Harris might have fled the jurisdiction because of the kidnapping and not the murder charge; and for failing to criticize appellate counsel for not challenging on appeal Mickles's "suggestive identification" of him at trial. Additionally, Harris alleged that his postconviction counsel was ineffective because he did not sufficiently plead the "prejudice prong" of the ineffectiveness claim.

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[8] The trial court summarily stated that Harris's remaining nine claims of ineffective assistance of counsel were not supported by "persuasive evidence, reasons or authority demonstrating error" and found them all without merit.

On March 19, 2003, the State filed an opposition to the motion to reopen, arguing that Harris had not shown that it was "in the interests of justice" to reopen the closed postconviction proceedings. With regard to the flight instruction, the State argued, *inter alia*, that there was ample evidence in the record for the jury to infer that, when Harris fled, he knew he was or would be charged with Lyndetta's murder. In response to Harris's allegation that his postconviction counsel had failed to plead prejudice, under *Strickland*, the State pointed to the petition for postconviction relief, which in fact pleaded prejudice.

Finally, as to the impropriety *vel non* of the trial court's decision to allow the jury to continue to deliberate the first-degree murder charge after it rendered guilty verdicts on the second-degree murder and the handgun charges, the State argued that the issue had been fully and fairly litigated "in excruciating detail" (including in this Court's unreported opinion discussed above), and thus was waived.

On April 17, 2003, Harris wrote a letter to the court, responding to the State's opposition and arguing that the issue of whether it was proper for the jury to continue deliberating on the first-degree murder charge had not been fully and fairly litigated. He argued, *inter alia*, that, under *Hoffert v. State*, 319 Md. 377 (1990), "[o]nce a jury's verdict is established as unanimous, whether by hearkening or polling . . . [t]he case is no longer within the province of the jury, and its verdict is final."

On April 30, 2003, the court issued a "Memorandum and Order" denying Harris's motion to reopen, without a hearing. The court briefly recounted the procedural history of the case. After explaining that it has discretion under the UPPA to reopen a postconviction proceeding upon determining that to do so would be "in

the interests of justice," the court concluded that Harris's motion to reopen was without merit.

On May 29, 2003, Harris filed a motion for reconsideration, alleging that the trial court should reconsider its decision because it had summarily denied Harris's motion to reopen closed postconviction proceedings without issuing an opinion or statement on the record discussing Harris's specific arguments individually.

On June 5, 2003, the court denied Harris's motion for reconsideration.

On July 7, 2003, Harris filed an application for leave to appeal, which was granted on October 24, 2003.

STANDARD OF REVIEW

We review a circuit court's denial of a motion to reopen a closed postconviction proceeding for abuse of discretion. *Gray v. State*, 158 Md. App. 635, 648 (2004) (concluding that the circuit court did not "abuse its discretion by refusing to reopen the postconviction proceeding"); *see also* CP § 7-104 (stating that a court "may reopen a postconviction proceeding" if the court determines, in exercising its discretion, that the action is "in the interests of justice").

DISCUSSION

The UPPA applies to persons "confined under sentence of death or imprisonment" or "on parole or probation." CP § 7-101. Generally, such a person may file a petition for postconviction relief for up to ten years after a sentence is imposed,[9] if he alleges:

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[9] In a case in which a sentence of death has not been imposed, and it has been more than ten years since the sentence was imposed, a

> (1) the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of the State;
> (2) the court lacked jurisdiction to impose the sentence;
> (3) the sentence exceeds the maximum allowed by law; or
> (4) the sentence is otherwise subject to collateral attack on a ground of alleged error that would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy.

CP § 7-102(a).

In addition to these requirements, to file a petition for postconviction relief, a person also must be seeking to set aside or correct a judgment or sentence, and the error alleged regarding the judgment or sentence must not have been "previously and finally litigated or waived" in the proceeding resulting in the conviction, or in any other subsequent proceeding in which the person sought relief from his conviction. CP § 7-102(b).

A petition for postconviction relief must include, among other things, the allegations of error, a statement of facts supporting the allegations of error, a statement of facts demonstrating that the petitioner never waived the allegations of error, and the type of relief sought. Md. Rule 4-402(a).

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person cannot file a petition for postconviction relief "[u]nless extraordinary cause is shown." CP § 7-103(b)(1).

A person may file but one petition for postconviction relief for each trial or sentence.[10] CP § 7-103(a). However, a circuit court may reopen a closed postconviction proceeding upon determining that doing so is "in the interests of justice." CP § 7-104.

As a matter of right, a person filing a petition for postconviction relief is entitled to a hearing and the assistance of counsel. CP § 7-108(a); Md. Rule 4-406(a). There is no entitlement to have a closed postconviction proceeding reopened unless the petitioner asserts facts that, "if proven to be true at a subsequent hearing[,] establish that postconviction relief would have been granted but for the ineffective assistance of . . . postconviction counsel." *Stovall v. State*, 144 Md. App. 711, 716 (2002); *see also* CP § 7-104.

The UPPA was created in part to provide a forum for litigating ineffective assistance of counsel claims. *Harris v. State*, 299 Md. 511, 517 (1984). The Sixth Amendment to the United States Constitution guarantees all criminal defendants the right to the assistance of counsel. *Strickland*, *supra*, 466 U.S. at 684-85. Furthermore, "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); *see also Mosley v. State*, 378 Md. 548, 557 (2003) ("Integral to [the right to counsel under Maryland law] is the right to effective assistance of counsel.").

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[10] When the UPPA was enacted in 1958, it placed no limit on the number of postconviction petitions that a person could file. *Mason v. State*, 309 Md. 215, 217-18 (1987). In 1986, the General Assembly amended the UPPA to provide that only two petitions for postconviction relief may be filed arising out of each trial. *Grayson v. State*, 354 Md. 1, 3 (1999). In 1995, the General Assembly reduced the number of petitions for postconviction relief that a person may file for a particular trial to one. *Id.* at 4.

The right to effective assistance of counsel applies even when the right arises under statutory law. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *State v. Flansburg*, 345 Md. 694, 703 (1997) ("Regardless of the source, the right to counsel means the right to the effective assistance of counsel."); *see also Stovall, supra*, 144 Md. App. at 715 (holding that a postconviction petitioner has a right to effective assistance of postconviction counsel).

In Maryland, courts must apply the standard announced in *Strickland, supra*, to determine whether counsel's representation comported with the requirements of the Sixth Amendment. *Gross v. State*, 371 Md. 334, 348 (2002). To prevail on an ineffective assistance of counsel claim, a petitioner must satisfy a two-pronged test: he must demonstrate that his counsel's performance was deficient and that he was prejudiced by the deficient performance. *Strickland, supra*, 466 U.S. at 687; *Mosley, supra*, 378 Md. at 557; *State v. Peterson*, 158 Md. App. 558, 583 (2004).

To prove the performance prong of the *Strickland* standard, the petitioner must show that counsel's representation "fell below an objective standard of reasonableness," *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland, supra*, 466 U.S. at 688), as measured by "prevailing professional norms." *Id.; Mosley, supra*, 378 Md. at 557. Until a petitioner proves otherwise, the court presumes counsel's representation was professionally competent and "derived not from error but from trial strategy." *Peterson, supra*, 158 Md. App. at 584 (quoting *Mosley, supra*, 378 Md. at 558).

In *Strickland*, the Supreme Court held that, in situations in which prejudice is not presumed, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694.

See also Holland v. Jackson, ___ U.S. ___, 124 S.Ct. 2736, 2738 (filed June 28, 2004) (same). Our Court of Appeals has held that the *Strickland* prejudice standard aptly can be described as whether there was a "substantial or significant possibility that the verdict of the trier of fact would have been affected." *Bowers v. State*, 320 Md. 416, 427 (1990). *See also Oken v. State*, 343 Md. 256, 284 (1996) (stating that the defendant "must show that there is a substantial possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different"); *Williams v. State*, 326 Md. 367, 373-74 (1992) (same).

With that legal background, we turn to Harris's contentions.

I.

Harris first contends that the postconviction court abused its discretion in denying his motion to reopen based on ineffective assistance of trial counsel. He argues that his trial counsel performed deficiently, to his prejudice, by not objecting when the trial court directed the jury to continue deliberating on the first-degree murder charge after the court accepted verdicts of guilty of second-degree murder and handgun charges, and polled the jury on those verdicts.

This contention only can have merit if Harris's double jeopardy argument has merit, which it does not.

The Fifth Amendment to the United States Constitution protects persons from being "subject for the same offence to be twice put in jeopardy for life or limb." The right extends to the States by application of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969); *State v. Woodson*, 338 Md. 322, 327-28 (1995). Maryland common law also prohibits double jeopardy for the same crime. *Smith v. State*, 299 Md. 158, 163 n.2 (1984). Specifically, in Maryland, once the "jury

or the judge[ ] intentionally renders a verdict of 'not guilty,' the verdict is final, and the defendant cannot later be retried on or found guilty of the same charge." *Id.* at 163 (quoting *Pugh v. State*, 271 Md. 701, 706 (1974)).

One of the essential characteristics of a final verdict is unanimity. Md. Const. art. 21 ("That in all criminal prosecutions, every man hath a right . . . to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty."). *See also Ford v. State*, 12 Md. 514, 549 (1859) (noting that unanimity is "indispensable to the sufficiency of the verdict"). Also, before a verdict is final, a jury must either be hearkened or polled. *Smith, supra*, 299 Md. at 168 (citing *Givens v. State*, 76 Md. 485, 487 (1893)). A defendant has the absolute right to poll the jury, and polling is a "fully commensurable substitute for hearkening." *Ross v. State*, 24 Md. App. 246, 254 (1975), *rev'd on other grounds*, 276 Md. 664 (1976).[11]

"While the case is still within the province of the jury, the court may permit them to reconsider and correct the verdict, provided nothing be done amounting to coercion or tending to influence conviction or acquittal." *Smith, supra*, 299 Md. at 168. When "the verdicts of the jury are not complete, and the jury is still under the aegis of the court, the jury may resume its deliberation to

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[11] In *Ross v. State*, *supra*, 24 Md. App. at 252, we explained the process of hearkening the verdict as "[b]y the common-law procedure, . . . the verdict of the jury was orally pronounced in open court, then recorded by the clerk, and affirmed by the jury, which was done by that officer saying to them to hearken to their verdict as recorded by the court, and repeating to them what had been taken down for the record." (Citation omitted.) While courts in Maryland have not adopted a particular procedure for hearkening and there is no reference in the Maryland Rules about hearkening, the process generally requires the jurors to assent to the verdict in the manner in which it was stated by the foreman and accepted by the Court. *Glickman v. State*, 190 Md. 516, 527 (1948).

resolve the verdicts required to be rendered." *Hoffert v. State*, 319 Md. 377, 387 n.3 (1990).

Subsection (d) of Rule 4-327 governs the procedure for partial verdicts in criminal cases:

> **Two or more counts.** When there are two or more counts, the jury may return a verdict with respect to a count as to which it has agreed, and any count as to which the jury cannot agree may be tried again.

Subsection (e) of that rule governs polling:

> **Poll of jury.** On request of a party or on the court's own initiative, the jury shall be polled after it has returned a verdict and before it is discharged. If the jurors do not unanimously concur in the verdict, the court may direct the jury to retire for further deliberation, or may discharge the jury if satisfied that a unanimous verdict cannot be reached.

Harris's double jeopardy argument rests on the concept that he was impliedly acquitted of first-degree murder when the jury rendered its verdicts of guilt on the second-degree murder and handgun charges and was polled; and therefore his conviction of first-degree murder was for a crime for which he had been acquitted. Harris bases his assertion that he was impliedly acquitted of first-degree murder on *Green v. United States*, 355 U.S. 184 (1957); on his reading of subsections (d) and (e) of Rule 4-327; and on *State v. Knight*, 143 Wis. 2d 408 (1988).

In *Green v. United States*, the defendant was indicted on two counts: 1) arson; and 2) causing the death of a woman by the alleged arson which, if true, amounted to first degree murder. At the close of the evidence at

trial, the court instructed the jury that it could find Green "guilty of arson under the first count ***and of either*** (1) first-degree murder ***or*** (2) second-degree murder under the second count," even though the prosecutor had not charged Green with second-degree murder under the second count. 355 U.S. at 185 (emphasis added). The jury returned a verdict of guilty of arson and second-degree murder; it was silent on the first-degree murder charge. The trial court accepted the verdict and dismissed the jury. After he was sentenced, Green appealed the second-degree murder conviction. The United States Court of Appeals for the District of Columbia reversed, on the ground that the trial court erred by instructing the jury on second-degree murder.[12] On remand, Green was retried for first-degree murder, under the original indictment. He was found guilty of that crime and sentenced to death. On appeal, the judgment was affirmed.

The Supreme Court granted *certiorari* and reversed the conviction on double jeopardy grounds. Emphasizing that, at the first trial, the jury was instructed that it could find Green guilty of first-degree murder (felony murder theory) ***or*** second degree murder, the Court concluded that, in that circumstance, the guilty verdict for second-degree murder was an "implicit acquittal" on the first-degree murder charge. *Id.* at 190. The Court observed that, because "the jury was dismissed without returning any express verdict on [the first-degree murder] charge and without Green's consent . . . . [even though] it was given a full opportunity to return a verdict

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[12] The United States Court of Appeals for the District of Columbia Circuit concluded that all the testimony as to what occurred in the case pointed to first-degree murder, "and nothing else." *Green v. United States*, 218 F.2d 856, 859 (D.C. Cir. 1955). The Court found that there was no reason for the trial court to give a second-degree murder instruction and determined that doing so was reversible error, entitling Green to a new trial.

and no extraordinary circumstances appeared which prevented it from doing so[,]" the circumstances were no different than if the jury had returned a verdict expressly stating: "We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree." *Id.* at 191. Accordingly, Green could not be retried for first-degree murder because his "jeopardy for first degree murder came to an end when the jury was discharged." *Id.*

There are crucial distinctions between this case and *Green*. In *Green*, the acquittal on the first-degree murder charge was implied from the jury's silence on that charge when they rendered guilty verdicts on the second-degree murder charge and then were discharged. In the case at bar, in contrast, the jury was not silent about the first-degree murder charge. Rather, when the jurors were convened to deliver their verdicts, the foreman said they had reached an agreement on the second-degree murder and handgun charges, but had not reached an agreement on the first-degree murder charge. From this statement, one cannot imply a unanimous verdict of acquittal, as Harris urges. Also, in *Green*, the jurors were told that they could convict Green of either second-degree murder or first-degree murder. Thus, silence on the first-degree murder charge in the face of a guilty verdict on the second-degree murder charge connoted a choice not to convict of first-degree murder. In Harris's trial, the jury was not so instructed and was free to return a verdict on the first-degree murder ***and*** second-degree murder charges.[13]

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[13] In Maryland, a jury may return guilty verdicts for both greater and lesser-included offenses. *See Snowden v.* State, 321 Md. 612, 617 (1991). It is only in the sentencing phase of the trial that a lesser-included offense will merge into the greater offense. *Id.* Furthermore, in *Griffiths*, *supra*, the Court of Appeals held that, when, in a multi-count indictment, a defendant was found guilty of a lesser-included offense but there was a mistrial on the greater offense, double jeopardy principles were not offended when the defendant was later retried on the greater offense.

There also is no merit to Harris's argument based on Rule 4-327(d) and (e). He reads those subsections to mean that, once the jury rendered verdicts on two counts and was polled on those verdicts, it was prohibited from further deliberation, with the result that he was automatically acquitted of the remaining first-degree murder count. This analysis is contrary to the plain language of the subsections, however.

Under subsection (d), the jury may return a verdict on a count as to which it has agreed, and any count "to which the jury cannot agree may be tried again." Here, the jury returned verdicts on two counts on which the jurors agreed – a partial verdict. The jurors stated that they could not agree on the remaining first-degree murder count, but the court, thinking they were not hopelessly deadlocked, gave them an *Allen* charge and had them deliberate further; they then reached a verdict on that count. Subsection (d) did not preclude the jury from deliberating further on the undecided count any more than it would have precluded a retrial on that count, had the jurors been unable to unanimously decide it.

Furthermore, there is nothing in subsection (e) to suggest that polling the jury on its second-degree murder and handgun charge verdicts worked an acquittal on the undecided first-degree murder charge. That subsection permits the court to retire the jury for further deliberations if a poll taken on a verdict discloses that the verdict is not unanimous. For example, if, during the poll on the second-degree murder charge, one of the jurors had said his verdict was not guilty, the court could have retired the jury to further deliberate on that count.

Subsection (e) does not prohibit a court from directing jurors to further deliberate on a count on which they are in disagreement after returning a verdict on a count on which they have agreed; and it certainly does

not effect an automatic acquittal on the remaining count. Indeed, any such reading of subsection (e) would be inconsistent with subsection (d). If polling a jury on decided counts worked an acquittal on a remaining count over which the jury was in disagreement, there could not be a retrial of the remaining count, even after a hopeless deadlock on it.

State v. Knight does not support Harris's double jeopardy argument either. In that case, Knight and a codefendant were charged with robbery, endangering safety by conduct regardless of life, and false imprisonment. After 14 hours of deliberations, the jurors sent a note to the judge saying they were unable to reach a unanimous decision on the two robbery charges (one for each defendant). The parties agreed to accept the jury's verdicts without further deliberation. When the jury was brought out, a juror informed the court that it was "deadlocked" as to the robbery counts and they "did not want any more time to deliberate" because more time would not help them reach verdicts on those counts. 143 Wis.2d at 412. The court took the verdicts on the decided counts, which were that both defendants were guilty of endangering safety and false imprisonment. The judge then gave an *Allen* charge and retired the jurors to deliberate on the robbery charges. They returned with guilty verdicts later that day.

The Supreme Court of Wisconsin reversed Knight's robbery conviction. It held that, because in taking the verdicts on the endangering safety and false imprisonment counts, the court did not "indicate . . . that it was accepting only [the] verdicts that the jury had agreed upon[,]" the court "effectively accepted" the two verdicts ***and*** the deadlock. *Id.* at 417-18. Accordingly, the trial court should have declared a mistrial on the robbery count, due to the deadlock, and not retired the jury to deliberate further, that being an "inva[sion of] the province of the jury." *Id.* at 418.

Clearly, the *Knight* case did not concern double jeopardy principles and was not decided on that issue. The *Knight* court did not hold that a partial verdict worked an implied acquittal on the remaining count, as Harris argues. Rather, it held that acceptance by the court of a deadlock on one count as the jury's final verdict on that count required a mistrial on that count — not an acquittal. The holding in *Knight* did not preclude a retrial of the robbery charge.

We note, moreover, that the facts in the *Knight* case were unlike those in the case at bar. Here, the jury deliberated for only a few hours and did not make an emphatic statement that further deliberations on the first-degree murder count would be fruitless. Furthermore, the trial court did not accept a deadlock on the first-degree murder count as the jury's final verdict on that count. The trial court accepted a partial verdict on the second-degree murder and handgun charges, under circumstances that made plain that that was what was happening and, upon giving an *Allen* charge, retired the jury for further deliberation on the first-degree murder count. Whether the trial court acted properly in doing so, including whether its actions invaded the province of the jury – the issue in common with *Knight* – already was decided by this Court on direct appeal, adversely to Harris.

As noted above, trial counsel objected to the *Allen* charge, and thus properly preserved for review the issue of whether the court erred in directing further deliberation on the first-degree murder charge. Trial counsel did not interpose an objection based on double jeopardy. For the reasons we have explained, that was not deficient performance. The jury had reached unanimous verdicts on the second-degree murder and handgun charge counts, and the taking of a partial verdict on those counts was permitted by Rule 4-327(d). The jury was not silent on the first-degree murder count; rather, it told the judge it could not agree on that count.

Accordingly, there was not an implied acquittal. Also, polling the jury under 4-327(e) on the two counts on which it rendered a verdict did not work an implied acquittal on the remaining count. Harris thus was not in the position of being tried again for an offense he had been acquitted of, and an objection on that ground was not warranted and ultimately would have proven fruitless.

Because there is no merit to Harris's ineffective assistance of trial counsel claim, the postconviction court did not abuse its discretion in denying his motion to reopen the postconviction proceeding to hear that claim.[14]

II.

We next consider whether the trial court abused its discretion in declining to reopen Harris's closed postconviction proceeding to hear his claims of ineffective assistance of postconviction counsel. Harris makes four arguments in this respect.

A. Flight Instruction

Generally, evidence of flight following a crime is admissible to show consciousness of guilt. *Sorrell v. State*, 315 Md. 224, 227 (1989).

Harris maintains that appellate counsel should have argued on direct appeal that there was insufficient evidence to connect his flight to Lyndetta's murder. Therefore, he contends, the trial court should have reopened the postconviction proceeding to hear his claim

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[14] As noted above, Harris's argument that the trial court and counsel agreed to accept only the second-degree murder and handgun charge verdicts as the final verdicts in the case was addressed and rejected, on the facts, in the 1997 postconviction decision. We agree that the record does not support Harris's assertion that any such agreement was reached.

that, in 1997, postconviction counsel performed deficiently by not criticizing appellate counsel's handling of the flight instruction on direct appeal.

On direct appeal, Harris's appellate counsel raised the issue of "[w]hether the trial court erred in propounding a flight instruction [at Harris's trial]." We decided the issue by determining whether the evidence had generated the flight instruction. Holding that it had, we explained:

> [T]he circumstantial evidence was sufficient to generate an instruction as to flight. There was evidence that Harris drove a car with Maryland plates; that in the months immediately preceding the murder, he had lived either with his brother in Baltimore or his aunt in Washington; *that Harris knew the police wanted to question him about the Mickles murder*; and that, at the time of his arrest, he had moved to Connecticut. We find that sufficient evidence of flight was presented to support a jury instruction . . .

Slip op. at 15 (emphasis added). We also noted that, in deciding to give the flight instruction, the trial court pointed out that witnesses had testified that Agent Montgomery in fact had connected Lyndetta's name to the homicide being investigated, both while talking to Holt in person — immediately before Holt spoke to Harris on the telephone — and while talking to Harris on the telephone.

It is evident, then, from our opinion in this case on direct appeal, that appellate counsel raised the issue of whether the flight instruction was generated by the evidence and, in deciding the issue, this Court took into account that there was evidence connecting Harris's flight to his knowledge that Lyndetta had been murdered.

Thus, the issue Harris now faults appellate counsel for not raising on direct appeal in fact was raised and decided on direct appeal.

That being the case, postconviction counsel could not have performed deficiently by failing to criticize appellate counsel on this issue; and the postconviction court therefore did not abuse its discretion in declining to reopen the proceedings to hear a claim based on the issue.

B. Alleged In-court Identification

Harris next contends that the postconviction proceeding should have been reopened to hear his claim that postconviction counsel was ineffective for failing to criticize appellate counsel for not challenging on direct appeal Mickles's "suggestive identification" of Harris. Harris maintains that Mickles's trial testimony was tantamount to an unduly suggestive in-court identification that created a substantial likelihood of misidentification, and therefore violated his due process rights.

We conclude, upon examining the record, that nothing in Mickles's testimony at all resembled an improper in-court identification of Harris. After hearing Mickles's testimony out of the presence of the jury, the court ruled that she could testify that, on April 10, Lyndetta said she intended to go to the movies with "Percy" and she could describe the driver of the car that Lyndetta got in later that night. The court ruled that Mickles could not point to Harris at trial or otherwise use the name "Percy." In her ensuing trial testimony, in answer to questions by the prosecutor, Mickles adhered to the court's restrictions. She did not make an in-court identification of Harris.

On cross-examination by defense counsel, in response to a leading question, Mickles said that the first time she saw Harris was when he came to get Lyndetta

on April 10, 1988; and that she had seen him since in the ensuing court proceedings. This testimony also was not an in-court identification of Harris, much less a suggestive one carrying a substantial likelihood of misidentification.

There was no due process violation with respect to Mickles's testimony, and therefore postconviction counsel did not render ineffective assistance for not criticizing appellate counsel for not raising this issue on direct appeal.[15] For that reason, the postconviction court did not abuse its discretion in refusing to reopen the postconviction proceeding to hear this issue.

C. Ineffective Assistance of Postconviction Counsel in Pleading Waiver and Prejudice in the Postconviction Petition

Harris next contends that the postconviction court should have reopened his closed postconviction proceeding so he could show that postconviction counsel was ineffective by not properly pleading Harris's postconviction petition, in two respects: counsel did not allege non-waiver by Harris of several fundamental rights implicated in numerous due process violations at trial; and counsel did not properly plead the prejudice prong of *Strickland*.

Although in his questions presented, Harris asserts a pleading failure by postconviction counsel, his argument on this question slips back and forth between assertions of inadequate pleading and inadequate proof,

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[15] We further note that the real substance of this issue was addressed by the postconviction court when it denied relief to Harris in 1997. There, Harris alleged that trial counsel was ineffective for "open[ing] the door" on cross-examination to allow Mickles to identify Harris. In that challenge, the postconviction court found that trial counsel had not performed deficiently.

as if the two are the same. Clearly, they are not. Because Harris makes both assertions, we shall address them both.

1. Waiver of Fundamental Rights

Another purpose of the UPPA is to afford a convicted person a forum in which to pursue relief for due process violations that occurred at trial and implicated a fundamental right that was not previously litigated or waived. *See* CP §§ 7-102(b) and 7-106(b); *Jackson v. Warden of the Md. Penitentiary*, 236 Md. 634, 635 (1964). The burden is on the petitioner to prove that the alleged error was not waived. Waiver in this context, that is, in the context of due process violations that implicate fundamental rights,[16] ordinarily must be intelligently and knowingly made. CP § 7-106(b). Alternatively, the petitioner must prove that special circumstances exist as to why he failed to allege the error in a prior proceeding. *Id.*

a. Pleading Non-Waiver

In his motion to reopen, Harris asserted that postconviction counsel did not adequately plead non-waiver as to three errors: 1) the trial court's improperly allowing the jury to deliberate on the first-degree murder count, in violation of Harris's right to be free from double jeopardy; 2) the trial court's giving a faulty reasonable doubt instruction; and 3) the trial court's failing to

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[16] The "knowing and intelligent" standard for waiver does not apply, for example, to "[t]actical decisions, when made by an authorized competent attorney, as well as legitimate procedural requirements"; the definition of waiver in these instances is governed by caselaw, pertinent statutes, or rules. *Curtis v. State*, 284 Md. 132, 150-51 (1978). *See also State v. Rose*, 345 Md. 238, 244-45 (1997); *Hunt v. State*, 345 Md. 122, 138 (1997).

intervene when the prosecutor made improper statements in closing argument.

The postconviction petition shows that postconviction counsel properly pleaded non-waiver as to the three issues Harris mentions. As to all three issues, the petition alleged that Harris "did not intelligently or knowingly fail to allege these grounds previously because he was never advised of his right to do so, either by his trial attorney or by the trial court." It further averred that the postconviction court should not bar Harris's postconviction claim for "procedural" reasons because to do so would be "inconsistent with the waiver standard in [the UPPA]." As to the double jeopardy claim, postconviction counsel alleged that "this issue has not been waived because it involves a fundamental right ([d]ouble [j]eopardy) and [Harris] never 'intelligently and knowingly' waived this right." Finally, specific to the reasonable doubt instruction, the petition alleged that Harris "has not waived this claim because a proper reasonable doubt instruction implicates [Harris's] fundamental right to a fair trial where he is presumed innocent . . . . [which he] has not 'intelligently and knowingly' waived."

In addition, in denying Harris postconviction relief, the postconviction court never mentioned at any point that the issue of non-waiver as to fundamental rights had not been properly pleaded. Moreover, the postconviction court did not decide non-waiver on the basis of failure to plead, as Harris now argues; rather, it addressed the non-waiver issue on its merits, finding that Harris's evidence had not rebutted the presumption of waiver. Accordingly, there is no merit to Harris's argument that postconviction counsel was ineffective because he did not plead non-waiver of fundamental rights.

b. Proving Non-Waiver

To the extent that Harris is asserting that postconviction counsel failed to *prove* non-waiver, this argument also lacks merit. As noted above, the postconviction court *did reach* the merits of this issue; it concluded that it was "not persuaded" by the evidence that the presumption of non-waiver had been rebutted. Furthermore, to this Court, Harris does not explain what further proof postconviction counsel could have offered with respect to the non-waiver issue.

Harris does not make any argument at all about two of the due process issues: the reasonable doubt instruction and the prosecutor's statements in closing argument. He mentions these issues only in a footnote, without any explanation of their substance (for example, what constituted the reasonable doubt instruction and what was deficient about it, and what was said by the prosecutor in closing), or any argument about how they implicated his fundamental rights. Without an explanation of the substance of these issues and what additional proof postconviction counsel should have brought forth, we cannot agree with Harris that postconviction counsel rendered ineffective assistance on this ground.

Finally, for the reasons we already have explained, there was no double jeopardy violation in this case. The trial court did not allow Harris to be convicted of a crime he had been acquitted of. Even if the postconviction court had ruled in 1997 that Harris had not waived this fundamental right, that ruling would have had no impact on the outcome of the case. Accordingly, there was no reason to reopen the postconviction proceeding on that ground.

2. Pleading Prejudice

Harris asserts that his postconviction counsel was ineffective because he failed to properly plead prejudice, the second requirement of an ineffective assistance of

counsel claim under *Strickland*.[17] He cites the postconviction court's September 5, 1997 memorandum and order denying his petition for postconviction relief as support for this assertion.

The postconviction court's memorandum and order does not support Harris's assertions. The postconviction court did not deny Harris relief on the ground that postconviction counsel did not properly plead prejudice under *Strickland*. On the contrary, the postconviction court ruled that it was not persuaded by the evidence that Harris had proved the ***performance*** prong of *Strickland* (*i.e.*, that the errors postconviction counsel was alleging on the part of trial counsel and appellate counsel constituted deficient performance). Moreover, contrary to Harris's argument, postconviction counsel ***did*** properly plead the prejudice prong of the *Strickland* test.

D. Cumulative Errors

Finally, Harris argues that the postconviction court erred in not reopening the closed postconviction proceeding because all of postconviction counsel's errors, considered cumulatively, constituted ineffective assistance of counsel. Because, as discussed *supra*, we find no merit to any of Harris's ineffective assistance of counsel claims, we likewise find this argument to be without merit.

ORDER AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.

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[17] As noted above, in his brief, Harris at times argues that postconviction counsel did not properly ***plead*** prejudice under *Strickland*, and at times argues that he did not properly ***prove*** prejudice, without recognizing any distinction between the two.

APPENDIX B

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

STATE OF MARYLAND	:	
	:	
vs.	:	Case No. CT890917X
	:	
PERCY STANLEY HARRIS	:	
	:	
Petitioner	:	

MEMORANDUM, OPINION AND ORDER OF THE COURT

This matter comes before the Court for Post Conviction Relief of Petitioner, Percy Stanley Harris. On November 9, 1990, Petitioner was convicted of first degree murder and use of a handgun in commission of a crime of violence. On January 8, 1991, he was sentenced to life plus twenty years for the handgun conviction. On June 20, 1997, the Court held an evidentiary hearing on the Petition, and the parties were given fifteen days to file memoranda. Considering all matters raised in memoranda and the hearing, the Court denies the Petition.

Petitioner makes various allegations of ineffective assistance of counsel and prosecutorial misconduct. The Court has set forth below a brief examination of the applicable standards of review followed by each ground raised by Petitioner and the Court's reasons for denying relief.

A. DUE PROCESS

Petitioner is required by the Maryland Code Annotated, Article 27, Section 645(A) and the Maryland Rule 4-402(a)(4), (6) and (7) to properly address the matter of waiver in his petition or in any memorandum. Section 645(A) requires that any alleged error in the Post-

Conviction Petition has not been previously and finally litigated. It also requires that, *inter alia*, a petitioner's right to post conviction relief is contingent on the absence of waiver of any alleged grounds for that relief. Waiver is defined as intelligently and knowingly failing to make such allegation before trial, at trial or on direct appeal, unless the failure is excused because of "special circumstances." The burden of proving "special circumstances" is on petitioner. Section 645(A)(c) also states that where petitioner could have alleged his grounds for post conviction relief before trial, at trial or on direct appeal, there shall be a rebuttable presumption that the petitioner intelligently and knowingly failed to make such allegations. Section 645(A)(c)(2). Interpreting Section 645(A), The Court of Appeals has held that the knowing and intelligent waiver is only required where "fundamental" rights are at stake. Non-"fundamental" rights are waived where the possibility to exercise those rights existed, but petitioner or his counsel did not do so. *See McElroy v. State*, 329 Md. 136 (1993), *Walker v. State*, 343 Md. 629 (1996), *Wyche v. State*, 53 Md.App. 403 (1983). In *McElroy v. State*, the Court of Appeals held that the petitioner therein had waived his right to raise the trial judge's failure to instruct him that he did not have to abide by the plea agreement. The Court of Appeals found that this required instruction is a "fundamental" right. The Court also found that the petitioner was advised of his right to appeal and clearly acknowledged that advice on the record, but that he did not offer any evidence to rebut the presumption that he could have alleged this error on appeal. *Id.* at 146, 147. Petitioner did appeal his case, so he was certainly aware of his rights. Nonetheless, Petitioner did not raise most of his due process violations below in his appeal.

1. **Trial Court took partial verdict, allowed jury to be polled and then sent jury back for further deliberation of first degree murder charge.**

Considering the foregoing examination of due process, the Court is not persuaded that this ground has not been waived. Petitioner has said little or nothing to rebut the presumption of waiver, and has not demonstrated any "special circumstances," even if the ground mentioned constitutes a "fundamental" right.

2. Trial Court gave improper reasonable doubt instruction.

Considering the foregoing examination of due process, the Court is not persuaded that this ground has not been waived. Petitioner has said little or nothing to rebut the presumption of waiver, and has not demonstrated any "special circumstances", even if the ground mentioned constitutes a "fundamental" right.

3. Trial Court failed to stop prosecutor from making improper closing argument.

Considering the foregoing examination of due process, the Court is not persuaded that this ground has not been waived. Petitioner has said little or nothing to rebut the presumption of waiver, and has not demonstrated any "special circumstances", even if the ground mentioned constitutes a "fundamental" right.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

The actions of an attorney are presumed to have been sufficient. *Harris v. State*, 303 Md. 685, 699 (1985)("*Harris*" hereinafter). A petitioner has the burden to show that defense counsel performed deficiently, and that his performance prejudiced Petitioner. *Harris* at 696. A petitioner must show that any errors by counsel have resulted in a trial which would have been different "but for" these errors. *Harris*; *Strickland v. Washington*, 466 U.S. 668 (1984)("*Strickland*" hereinafter). The question is whether "under all of the circumstances of the particular

case, a petitioner was afforded genuine and effective assistance of counsel." *State v. Merchant*, 10 Md.App. 545, 550-551, 271 A.2d 752, 755 (1970).

The essential meaning and application of the elements of error and of prejudice requires recourse to the standard of reasonableness. "[T]he defendant [i.e., petitioner] must show that counsel's representation fell below an objective standard of reasonableness." *Strickland* at 687-688. The element of error requires that the Court consider all the circumstances of the case at bar. *Strickland* at 688-689. The Court cannot adopt inflexible rules as to what is or is not ineffective assistance of counsel because to do so would limit the independence of trial counsel, restrict the wide latitude that counsel has in making tactical decisions, as well as distract counsel from vigorously advocating petitioner's case. *Id.* Every effort should be made by the Court to eliminate hindsight and not find error where only mistaken matters of strategy and tactics exist. *See Id.*

The element of prejudice requires that when a petitioner challenges a conviction, the Court consider if a reasonable probability exists that, absent the errors, the factfinder would have found reasonable doubt regarding guilt. *See Strickland* at 691-696. The Court must consider how the factfinder would find reasonable doubt in the absence of the errors. This consideration may, for example, involve consideration of how the factfinder would find reasonable doubt in the absence of evidence admitted without objection. This consideration requires that the Court consider the totality of the evidence adduced at trial. *Id.*

The constitutional right to effective assistance of counsel does not guarantee a defendant in a criminal trial an error free or perfect trial. The Constitution guarantees a defendant a reliable trial - a fair adversarial testing process - supported by reasonable action or even inaction accompanied by counsel in the exercise of independent

judgment. *See Strickland* at 687-688. Moreover, although there is a presumption of reasonableness, even if action or inaction of counsel is not reasonable, the outcome must be shown to have been different – so different at to constitute a breakdown in the adversarial testing process. *See Strickland* at 690-696.

1. **Former defense counsel asked witness for identification of Petitioner, which constituted proof that Petitioner was last person seen with murder victim; although defense counsel obtained grant of motion in limine that state not be allowed to seek in court identification of witness. Defense counsel asked a question to which he did not know the answer.**

The Court is unpersuaded by a preponderance of the evidence that this ground is supported by persuasive evidence, reasons or authority demonstrating error. Inflexible standards, such as one cannot ask a question to which he does not know the answer, is an inflexible rule, a hindsight consideration. Indeed, the Court's own observation in over 1,000 jury trials is that the Bar routinely asks cross-examination questions not knowing the answer which successfully aids in the destruction of a witness' credibility. Upon hearing the testimony of defense counsel, Mr. Lamb, and considering all the circumstances of the case, the Court cannot find error.

2. **Former defense counsel failed to object to testimony of Virginia deputy sheriff regarding Petitioner's previous incarceration in Virginia; thereby allowing jury to hear negative character evidence.**

The Court is unpersuaded by a preponderance of the evidence that this ground is supported by persuasive evidence, reasons or authority demonstrating error. Petitioner has not demonstrated that said testimony was

inadmissible, *i.e.*, that objecting would have purpose. Also, Petitioner has not demonstrated how reasonable doubt would be found in the absence of this evidence.

3. **Former defense counsel failed to object to FBI agent's testimony, which was indirect comment on Petitioner's right to remain silent in the face of the agent's accusations.**

The Court is unpersuaded by a preponderance of the evidence that this ground is supported by persuasive evidence, reasons or authority demonstrating error. Petitioner has not demonstrated that said testimony was inadmissible, *i.e.*, that objecting would have purpose. Also, Petitioner has not demonstrated how reasonable doubt would be found in the absence of this evidence.

4. **Former defense counsel failed to object to admission of Virginia arrest warrant for Petitioner for kidnapping of murder victim.**

The Court is unpersuaded by a preponderance of the evidence that this ground is supported by persuasive evidence, reasons or authority demonstrating error. Petitioner has not demonstrated that said testimony was inadmissible, *i.e.*, that objecting would have purpose. Also, Petitioner has not demonstrated how reasonable doubt would be found in the absence of this evidence.

5. **Former defense counsel failed to object to prosecutor's expression of personal opinion in opening statement and closing argument and rebuttal.**

The Court is unpersuaded by a preponderance of the evidence that this ground is supported by persuasive evidence, reasons or authority demonstrating error. Petitioner has not demonstrated that the prosecutor's expressions were improper, *i.e.*, that objecting would have purpose. Also, Petitioner has not demonstrated that the

prosecutor actually mislead or influenced the jury or how reasonable doubt would be found in the absence of the expressions.

6. Former defense counsel failed to object to the Court's reasonable doubt instruction.

The Court is unpersuaded by a preponderance of the evidence that this ground is supported by persuasive evidence, reasons or authority demonstrating error. The trial judge's initial explanation of reasonable doubt was a verbatim rendition of the Maryland Pattern Jury Instructions, and the examples given in explanation thereafter did not vary from said instructions so as to be confusing or misleading.

7. Former defense counsel failed to object to the Court sending jury back for further deliberation of first degree murder charge.

The Court is unpersuaded by a preponderance of the evidence that this ground is supported by persuasive evidence, reasons or authority demonstrating error. None of Petitioner's three arguments as to the basis of error are convincing. Petitioner has argued that the verdict after polling was final, and therefore, further deliberations must cease. However he has not given any persuasive reasons or authorities to support this point under the circumstances of this case. Petitioner has argued that sending back the jury for further deliberations was a violation of Petitioner's rights against double jeopardy. However, the sending back cannot constitute a trial or further prosecution. Petitioner has argued that the sending back breached an agreement that the partial verdict taken would be the final verdict. The Court is unpersuaded by the evidence that there was a "meeting of the minds" between defense counsel and the Court that the partial verdict would be taken as a final verdict. Based on the record, as cited by Petitioner (Supplemental

Memorandum to Petition for Post Conviction Relief, page 2), the Court finds that no such agreement existed.

8. **Appellate counsel failed to raise the erroneous ruling excluding school records offered for impeachment purposes.**

The Court is unpersuaded by a preponderance of the evidence that this ground is supported by persuasive evidence, reasons or authority demonstrating error. The Court recognizes that appellate advocacy, no less than trial advocacy, cannot be judged in hindsight. Considering all of the circumstances of the case, the appellate advocate, like any advocate, cannot raise and argue every issue. Doing so may detract from effectively arguing the important issues, which must be determined as part of the advocates own strategy. The Court finds that whether or not to raise this ruling, considering all the circumstances in the case, is a matter of strategy and not an error supporting post conviction relief. Also, Petitioner has not demonstrated how reasonable doubt would be found in the absence of this evidence.

9. **Appellate counsel failed to raise the erroneous ruling allowing the State to introduce a post card from the murder victim to Petitioner as rebuttal evidence.**

The Court is unpersuaded by a preponderance of the evidence that this ground is supported by persuasive evidence, reasons or authority demonstrating error for the same reasons set out in section B.8, *supra*. Also, Petitioner has not demonstrated how reasonable doubt would be found in the absence of this evidence.

10. **Appellate counsel failed to raise the erroneous ruling allowing the State to reopen its case and present testimony of murder victim's mother as to her presence at Petitioner's Virginia kidnapping case.**

The Court is unpersuaded by a preponderance of the evidence that this ground is supported by persuasive evidence, reasons or authority demonstrating error for the same reasons set out in section B.8, *supra*. Also, Petitioner has not demonstrated how reasonable doubt would be found in the absence of this evidence.

11. **Appellate counsel failed to raise plain errors set out in section B.2 – B.7, supra.**

The Court is unpersuaded by a preponderance of the evidence that these grounds are supported by persuasive evidence, reasons or authority demonstrating error for the same reasons set out in sections B.2-B.7 and B.8, *supra*, and because there has been no demonstration of how reasonable doubt would be found in the absence of this evidence or actions of concern in each of sections B.2-B.7.

Considering the totality of the evidence and each ground discussed above, individually and cumulatively, the Court cannot find ineffective assistance of counsel on the part of Petitioner's former trial counsel or appellate counsel.

Accordingly, it is this 4th day of September, 1997, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that the Petition for Post Conviction Relief of Petitioner, be and the same is, denied.

/s/

Arthur M. Monty Ahalt, Judge

/s/

Karen T. Duckett,
Exec. Admin. Aide
Dated: September 4, 1997

Copies mailed by the Court to:

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APPENDIX C

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

STATE OF MARYLAND	:	
	:	
v.	:	CT 89-0917X
	:	
PERCY STANLEY HARRIS	:	
	:	
Defendant	:	

* * * * * * * * *

MEMORANDUM AND ORDER OF COURT

The Motion to Reopen Post-conviction in the above-captioned cases, which was filed by the above-captioned Defendant on September 20, 2002 alleging ineffective assistance of Post-Conviction counsel, Appellate counsel and trial counsel, and errors by the trial court, has been referred to the undersigned as a chamber's matter.

The Defendant filed an Application for Review of Sentence, which was affirmed without change on March 7, 1991. On February 13, 1992, The Court of Special Appeals entered a Mandate affirming the judgment of the trial court. The Court of appeals denied Petitioner's Petition for writ of certiorari on April 27, 1992.

The Defendant filed his first Petition for Post Conviction on March 12, 1997. A hearing was held on the Petition for Post Conviction Relief on June 20, 1997 before Judge Ahalt. On September 5, 1997, a Memorandum and Order of Court denying the Petition for Post Conviction Relief was filed. Thereafter, an Application to Appeal the Denial of the Petition for Post Conviction Relief was filed with the Court of Special Appeals. The Court of Special Appeals entered a Mandate

on January 7, 1998 denying the Application for Leave to Appeal.

Since October 1, 1995 the Maryland Uniform Post Conviction Procedure Act limits only one Petition per case, this Act also gives a trial court the discretion to reopen a post conviction proceeding "if the court determines that such action is in the interests of justice." MD Annotated Code, Criminal Procedure Article § 7-104.

Finding no merit in the Motion to Reopen First Post Conviction, it is this 29 day of April, 2003, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that the Motion to Reopen First Post Conviction be and is hereby **DENIED**.

/s/

Michael P. Whalen, Judge

Copies mailed by the Court to:

Dorianne Meloy, Esquire
Assistant State's Attorney

Byron L. Warnken, Esquire
Law Offices of Bonnie L. Warnken, LLC
32 East Preston Street
Baltimore, MD 21202

/s/ 4-29-03

Rebecca N. Cordero Date
Law Clerk to Judge Whalen

APPENDIX D

PERCY STANLEY HARRIS	*	IN THE
	*	COURT OF APPEALS
v.	*	OF MARYLAND
	*	Petition Docket No. 570 September Term, 2004
STATE OF MARYLAND	*	(No. 1268, Sept. Term 2003 Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answers filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell

Chief Judge

DATE: April 8, 2005

APPENDIX E

PERCY STANLEY HARRIS	*	IN THE
	*	COURT OF APPEALS
v.	*	OF MARYLAND
	*	Petition Docket No. 570 September Term, 2004
STATE OF MARYLAND	*	(No. 1268, Sept. Term 2003 Court of Special Appeals)

ORDER

The Court having considered the motion for reconsideration filed in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, denied.

/s/ Robert M. Bell

Chief Judge

DATE: June 17, 2005